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CASE NO. 06-5618

SUPREME COURT OF THE UNITED STATES
October 2005 Term

MARIO CLAIBORNE,)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court ruled that the mandatory use of the United States Sentencing Guidelines violated the Sixth Amendment right to a jury trial on any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory" and, therefore, just one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the section 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81 (1996).

In light of the foregoing, these issues are presented:

1. Does an appellate court make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range in reviewing a sentence outside that range, rather than granting deference to the sentencing judge's decision in light of all the 3553(a) factors?

2. Does granting a presumption of reasonableness to the guidelines range deny the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard chosen in *Booker*?

TABLE OF AUTHORITIES

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Koon v. United States, 518 U.S. 81 (1996)..... *i*, 6

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 439 F.2d 479 (8th Cir. 2006).

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on February 27, 2005. The petition for rehearing was denied on April 27, 2006. Petition for Certiorari, Appendix 5. The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REPLY BRIEF FOR THE PETITIONER

The government erroneously claims the Eighth Circuit did not apply a presumption of reasonableness to the Federal Sentencing Guidelines. Brief in Opposition 11-12. The government's reluctance to engage petitioner's argument is understandable, yet its claim that the Eighth Circuit did not employ a presumption of reasonableness in the guidelines to review a non-guidelines sentence embodies a tacit admission that to do so would violate *United States v. Booker*, 543 U.S. 200 (2005). Respondent's brief thus confirms the urgency of granting certiorari here to address the unconstitutional abuse of the presumption of guidelines reasonableness to reject non-guidelines sentences.

The Eighth Circuit based its rejection of petitioner's non-Guidelines sentence on a presumption that the Guidelines range was reasonable instead

The Solicitor General's claim that the Eighth Circuit did not apply a presumption of reasonableness to the guidelines to declare petitioner's non-guidelines sentence unreasonable flies in the face of the plain terms of the opinion:

> a. The Eighth Circuit cited the presumption of reasonableness in the guidelines, Appendix 3.
>
> b. The Eighth Circuit labeled the district court's sentence an "extraordinary variance from the guidelines range," using a purely mathematical measure of the percentage by which it fell short of the guidelines. Appendix 3.

c. The Eighth Circuit dismissed the district court's concern about the small amount of drugs involved by reasoning that the guidelines already accommodated that circumstance. Appendix 3.

d. The Eighth Circuit rejected the district court's assessment of the likelihood petitioner would re-offend by interposing its own judgment on appeal that a defendant who committed two drug offenses in six months "has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency." Appendix. 3-4.

e. The Eighth Circuit made no mention of the judge's predominant concern that imposing a guidelines range would be "tantamount to throwing [petitioner] away", or, to paraphrase 18 U.S.C. §3553(a), greater than necessary to achieve rehabilitation as well as punishment in view of petitioner's age.

In short, the analysis by which the Eighth Circuit rejected the district court's non-guidelines sentence as unreasonable rested entirely on the presumption that the contrary guidelines range ***was*** reasonable.

The Solicitor General purports to justify the Eighth Circuit's use of the guidelines in rejecting sub-guidelines sentences on the basis that *Booker* declared the advisory guidelines a still important consideration in sentencing defendants thereafter. Petitioner's sentencing judge, however, *did* seriously consider the guidelines advisory range and then imposed a lesser sentence based on additional considerations, specifically the rehabilitative consideration that a guidelines sentence would extinguish petitioner's chances for successful reintegration into

society. Petition for Certiorari, Appendix 6-7. The Eighth Circuit avoided any mention of these statements by the district court, although they comprised the dominant basis for the judge's rejection of a guidelines sentence.

Different appellate results occur depending on whether a circuit employs a presumption of reasonableness in the advisory guidelines range

The Second Circuit's opinion in *United States v. Jones*, 460 F.3d 190 (2nd Cir. 2006), refutes the government's claim that no material difference arises in the analysis or results reached by jurisdictions that do not grant a presumption of reasonableness in the guidelines (Brief in Opposition 12). This may, in turn, explain the government's failure to mention *Jones* despite the supplemental brief petitioner filed to cite that intervening case. The Second Circuit *affirmed* Jones's fifteen-month sentence for drug related charges notwithstanding the advisory guidelines range of 30-37 months. 460 F.3d at 195. The Second Circuit granted substantial deference to the district court's concerns about Jones's chances for rehabilitation and reintegration into society. Such concerns closely resembled those articulated by petitioner's sentencing judge, but neither the Eighth Circuit nor the Solicitor General make any mention of them.

The Solicitor General asserts that the Eighth Circuit did not engage in ***de novo*** review because the court of appeals said it applied a standard of review "akin

to * * * traditional review for abuse of discretion," and such review is consistent with the deferential standard of review referred to in *Koon v. United States*, 518 U.S. 81, 98 (1996). Brief in Opposition 13. The Solicitor General makes no effort to reconcile these assertions with the absence from the Eighth Circuit's opinion (and the government's own pleading) of any reference to the sentencing judge's explanation of her dominant concern that imposing a guidelines sentence would be "tantamount to throwing [petitioner] away." Nor does the Solicitor General explain how a "traditional review for abuse of discretion" authorizes an appellate court to reject a district court's sentence on the basis that the district judge failed to infer that the defendant engaged in other crimes of which no evidence or accusation appeared. Appendix 3.

Decision in *Cunningham* may well bear on appellate review of federal criminal sentencing

The Solicitor General volunteered that this Court need not hold this petition pending the Court's disposition of *Cunningham v. California*, No. 05-6551 (cert. granted Feb. 21, 2006), because that case involves a California sentencing scheme "unlike the federal sentencing scheme." Brief in Opposition 14. The transcript of oral argument in *Cuningham* refutes the government's quick dismissal of any

possible relevance *Cunningham* may have to the questions presented in this case. Several members of the Court observed that California's sentencing regime "looks a lot like the federal system after *Booker*," *Cunningham* Oral Argument Transcript 6 (Chief Justice Roberts speaking). *See also, e.g., Cunningham* Oral Argument Transcript at page 17, lines 1-3 (Justice Ginsberg: ". . . [I]sn't the middle sentence [in *Cunningham*] identical in function to the Federal sentencing guidelines advice?"); *id.* at page 20, lines 11-18 (Justice Breyer: "Now if [the California courts] are adopting what *Booker* says, that means, . . . that I guess a judge would have the power if it is reasonable to just say the guideline, thought it [is] thus and so, isn't right for my circumstance and therefore, I don't adopt it. . . ."). This Court's questions at the oral argument in *Cunningham* do not, of course, establish what the Court will ultimately rule in that case. The substantial attention paid to the post-*Booker* federal guidelines regime – particularly the role to be played by "reasonableness" review – during the *Cunningham* oral argument, however, counsels against denying certiorari before *Cunningham* is decided.

The Eighth Circuit's judgment is not an "interlocutory ruling"

The government erroneously labels the Eighth Circuit's decision an "interlocutory ruling." Brief in Opposition 8-9. The Eighth Circuit's ruling did not constitute an "interlocutory ruling." The government brought this appeal

from petitioner's final judgment of conviction and sentence. Appendix 1. The Eighth Circuit declared as a final matter that the district court's choice of a fifteen months sentence was unreasonable because it viewed a sixty percent reduction below the minimum guidelines term "is not supported by comparably extraordinary circumstances." Appendix 3. The examples the government cites of interlocutory rulings concerning injunctions entered to permit determination of damages and equitable remedies in civil cases do not support its designation of the Eighth Circuit's stark rejection of the district court's sentence as an "interlocutory ruling." Brief in Opposition 9. The bare fact the Eighth Circuit ordered a new sentence did not render interlocutory its ruling that fifteen months in this case is "unreasonable" *per se*, any more than the Seventh Circuit's order of a new sentencing of Freddie J. Booker constituted an "interlocutory ruling" in *Booker*. *See United States v. Booker*, 375 F.3d 508, 515 (7th Cir. 2004).

CONCLUSION

WHEREFORE, for the foregoing reasons, and those offered in petitioner's petition for a writ of certiorari and supplemental brief in support thereof, petitioner asks this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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1. Appellate Opinion in *United States v. Claiborne* (Feb. 27, 2006) ..... 1 - 4

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri.
Mario Claiborne,	*	
	*	
Defendant - Appellee.	*	

Submitted: December 13, 2005
Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next

door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). See 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. See U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under United States v. Booker, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under Booker, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir.), cert. denied 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). Booker, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005); see Haack, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. United States v. Saenz, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the

fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.